United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: May 24, 2006

TO : James J. McDermott, Regional Director
Region 31

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: American Broadcasting Companies, et al.
Case 31-CA-27698

512-5030-8000
512-5030-8050
512-5030-8075

This case was submitted for advice as to: (1) whether, in two state court wage and hour lawsuits, the charged party Employers' requests for discovery of communications between the named class action plaintiffs and the Union -- in furtherance of an anticipated motion to disqualify the class counsel due to its joint representation of the Union and the plaintiffs -- were unlawful under Section 8(a)(1) of the Act; and (2) whether the discovery requests that were limited or withdrawn during the "meet and confer" process were unlawful under Section 8(a)(1).

We conclude that the Employers lawfully sought this information, as it was clearly relevant to determining whether the class counsel should be removed due to a conflict of interest, and the Employers' interest in obtaining the information outweighed any harm to employees' Section 7 rights. We further conclude that the requests that the Employers revised or withdrew were not coercive under the totality of the circumstances, particularly in light of the Employers' legitimate conflict-of-interest concerns and their agreement to narrow or withdraw those requests.

Background and Facts

The Writers Guild of America, West (WGA or Union) is engaged in a campaign to organize writers who work on "reality" television shows. In July and August 2005, a group of these writers filed two class action lawsuits, each against several employers, alleging various wage and hour violations.[1] The two lawsuits were consolidated by the Los

[1] Specifically, on July 7, 2005, a group of twelve named plaintiffs filed a lawsuit against eight employers. Sharp, et al. v. Next Entertainment, Inc. et al., BC 336170. On August 23, 2005, a similar class action lawsuit was filed by

Angeles County Superior Court. Each of the charged party Employers is a named defendant in one of the two lawsuits. The class action plaintiffs in the consolidated lawsuit are represented by the law firm of Rothner, Segall & Greenstone (class counsel), which also represents the WGA in other matters. The WGA's general counsel is also a partner in the firm. It is undisputed that the WGA has been involved in investigating the claims underlying the class action and that it is fully funding the litigation.

In November 2005, attorney Jeffrey Richardson informed class counsel of defendants' position that the WGA is "driving" the litigation, and that they intended to move to disqualify Rothner, Segall & Greenstone as class counsel because of a conflict of interest between employees in the class and the WGA (by virtue of its representing both the plaintiffs and, in other matters, the Union). He added that the named plaintiffs should also be disqualified from the class if they were "put up to" the litigation by the Union. Richardson stated that he would need to conduct discovery on this issue in order to develop the Employers' disqualification motion.

In December 2005, the defendants/charged parties propounded interrogatories and requests for production of documents concerning individual plaintiffs and the WGA. On January 13, 2006,[2] the plaintiffs' attorneys filed objections to many of these requests on the ground (among others) that they infringe upon employees' Section 7 rights.[3] On January 20, the Employers gave notice of the depositions of several of the class action plaintiffs and the Union. The plaintiffs objected to the depositions and refused to appear for them.

The Employers duly "met and conferred" with the plaintiffs in an attempt to resolve these discovery disputes. At that time, the defendants agreed to limit and/or withdraw some of the contested discovery requests. Also, in connection with the unresolved discovery requests, the defendants, on two occasions, asked the plaintiffs to propose alternative or less intrusive means that would allow the necessary discovery without raising confidentiality

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ten named plaintiffs against two employers. Shriver, et al. v. Rocket Science Laboratories, LLC, et al., BC 338746.

[2] All subsequent dates are 2006.

[3] The Union also objected to many of the discovery requests on the grounds that they infringed upon the attorney-client privilege and the plaintiffs' associational rights under the First Amendment.

concerns. The plaintiffs did not propose such alternatives. After these attempts at resolution, the charged party defendants moved to compel the plaintiffs to comply with their discovery requests.

On February 2, Rothner, Segall & Greenstone filed the instant charge on behalf of the Union, alleging that certain of the discovery demands violate employees' Section 7 rights. Specifically, the Union objects to: (1) interrogatories asking the plaintiffs to describe the role of the Union in the litigation, how and by whom class counsel was selected, how they became involved in the litigation, and communications that they have had with the Union pertaining to the litigation; (2) requests for documents showing communications between the plaintiffs and the Union since January 2004[4] and communications evidencing the "role of the WGA" in the litigation; (3) notice of deposition of the plaintiffs regarding the above subject matters; and (4) notice of deposition of the Union regarding its role in and financing of the litigation, the selection of class counsel, the role of the litigation in the Union's organizing campaign, whether the Union would support a litigation settlement that did not include Union organization, and how the named plaintiffs became involved in the litigation. The Union also objected to a request in the notice of deposition of the Union regarding whether the named plaintiffs have signed authorization cards and support the WGA's organizing campaign. Defendants withdrew this last request.

A hearing on the defendants' motion to compel discovery was held on March 23. On March 27, the judge granted the motion in part and denied it in part. As to class counsel's argument that the discovery request infringes on employees' Section 7 rights, the judge ruled that Section 7 does not insulate the plaintiffs from the discovery of communications regarding the lawsuit. The judge stated that evidence of communications between named class members and the WGA is "essential" to prove or disprove the claim that WGA's interests in this class action diverge and conflict with those of the putative class. The judge stated:

> Thus, even if the discovery might work to inhibit the free and confidential exchanges between employees and the union, such effect is incidental and is far outweighed by the present need in this litigation to decide whether the relationship between WGA and class members vis-a-vis Class

[4] During the meet and confer sessions, the defendants limited this particular document request to communications regarding these cases.

> Counsel should be severed because of the existence *vel non* of a conflict of interest. This is particularly so where the discovery is narrowly drawn and reviewed in advance by the court to insure that it is narrowly drawn for the specific purpose of revealing a potential conflict, and is the least intrusive alternative available for discovering material evidence.

The judge determined that a "prima facie disqualification issue exists warranting further discovery," and that there is "good cause" to consider removal of class counsel because of its joint representation of the named plaintiffs and the Union. The court was concerned, however, about the potential for intrusion into the attorney-client relationship between class representatives and class counsel and between class counsel and the WGA. It recognized the possibility that such communications are privileged, especially those mediated by (or "copied-to") class counsel, but only on or after the date class counsel was retained by the named plaintiffs. Accordingly, the court narrowed the required responses for certain of the information requests in order to protect the attorney-client relationship.[5] Moreover, the court did not compel a response to requests seeking evidence of the "role of the WGA" in connection with the litigation[6] because the term "role" is "too ambiguous to be enforced."

ACTION

We conclude that the Employers lawfully sought the information at issue here, as it was clearly relevant to determining whether class counsel should be removed due to a conflict of interest, and the Employers' interest in obtaining the information outweighed any harm to employees' Section 7 rights. We further conclude that the withdrawn or revised requests were not coercive under the totality of the circumstances.

When an employer pursues in discovery information regarding Section 7 activity, the Board must consider whether the employer's constitutional interest in access to the courts and its legitimate use of legal proceedings in pursuit of such claims justifies the employer's actions.

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[5] For example, certain responses were limited to non-privileged written communications or communication copied or addressed to class counsel, the Union, and any named plaintiff jointly where no confidentiality is reasonably expected given the content of the communication.

[6] Document Request #38 and Interrogatory #33.

That inquiry has turned in part on the relevance of the protected information sought to the matter at issue in the lawsuit.[7]

In Guess, the Board announced a three-step analysis for determining whether questions that pertain to employees' protected concerted activities are permissible when propounded during discovery in a civil proceeding.[8] Specifically, it held that (1) the questioning must be relevant; (2) if the questioning is relevant, it must not have an "illegal objective;" and (3) if the questioning is relevant and does not have an illegal objective, the employer's interest in obtaining the information must outweigh the employees' Section 7 confidentiality interests.[9]

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[7] See Maritz Communications Co., 274 NLRB 200 (1985); Wright Electric, Inc., 327 NLRB 1194 (1999), enfd. 200 F.3d 1162 (8th Cir. 2000); and Guess?, Inc., 339 NLRB 432 (2003) (Guess).

[8] 339 NLRB at 434.

[9] Id.

Applying Guess,[10] we first conclude that the information sought by the Employers in the instant case was highly relevant. Each of the discovery requests at issue concerns factors relevant to the adequacy of class counsel and the named plaintiffs, specifically whether they have interests that may conflict with those of the putative class members.[11] As noted by the Region, each of the

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[10] Although Guess is extant Board law, we have serious concerns as to whether the balancing of an employer's need for information against the impact on Section 7 rights has a role in any aspect of a reasonably-based lawsuit in light of BE & K Construction Co. v. NLRB, 536 U.S. 516 (2002). Moreover, there are some questions about what the Board means by "illegal objective" in the discovery request context. To date, only Wright Electric and Guess, supra, have included an illegal objective consideration in the analysis of discovery requests, and neither decision has clearly delineated the parameters of discovery requests that generally will evince an illegal objective. Indeed, all that they definitively indicate is that the Board has discussed illegal objective in the context of discovery only as to requests for authorization cards or other information that infringes on employees' rights to preserve the confidentiality of their union activities. As authority for its illegal objective finding, Wright Electric relied solely on footnote 5 of Bill Johnson's, which in turn applies only to the underlying substance of a lawsuit, i.e. whether the requested remedy in the lawsuit would constitute a ULP in and of itself. That construction of footnote 5 was not used in either Wright Electric or Guess. In any event, it is unclear whether an illegal objective, however defined by the Board in those cases, would be insulated by the Supreme Court's holding in BE & K. However, in light of our conclusion here that there is no violation under existing Board precedent, this case is not an appropriate vehicle for asking the Board to clarify these issues.

[11] See, e.g., Kamean v. Teamsters Local 363, 109 F.R.D. 391 (S.D.N.Y. 1986) (motion for class certification denied in wage and hour suit against local union where the named representatives and their counsel had alliances with a competing union that was funding the lawsuit; conflict of interest precluded them from fairly and adequately representing the interests of the class). See also Martinez v. Barash, not reported in F.Supp.2d, 2004 WL 1367445 (S.D.N.Y.) (class decertified where named plaintiffs were "hand-picked" and coached for the litigation by a rival union and were effectively assigned counsel by the rival union).

interrogatories, requests for production, and matters for inquiry relates to one or more of the following topics: (1) the role of the Union in connection with the litigation; (2) how (and by whom) class counsel was selected; (3) how the named plaintiffs were selected or became involved in the litigation; (4) communications between the plaintiffs and the Union about the litigation; and (5) how the class action suits relate to the Union's organizing campaign. These are all valid areas of inquiry relevant to the appropriateness of class certification.[12] Moreover, in ruling on the motion to compel discovery, the judge found that evidence of communications between named class members and the WGA is "essential" to prove or disprove the claim that WGA's interests in this class action diverge and conflict with those of the putative class. Further, the court specifically determined that a "prima facie disqualification issue exists warranting further discovery" and that there is "good cause" to consider removal of class counsel because of its joint representation of the named plaintiffs and the Union.

Assuming, as did the Board in Guess, that the requests did not have an "illegal objective"[13] and applying the balancing prong of the Guess test, we conclude that the Employers' interest in the information outweighs any potential harm to employees' Section 7 rights. Unlike Guess and Wright Electric, where the employees about whom information was sought were non-parties who had not otherwise disclosed their own union affiliation or actions,[14] the named plaintiffs in this case have made known their ties to the Union. For example, the plaintiffs apparently accompanied Union officials to press releases publicizing the Union's central role in the class actions and the role of the lawsuit in the WGA organizing effort. As the judge noted, the "associational ties as between the named plaintiffs and the WGA are already obvious." Thus the discovery was propounded in order to confirm the truth of allegations publicly disclosed by the plaintiffs and the

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[12] Id.

[13] 339 NLRB at 434. See also fn. 10, above, discussing the uncertainty over the meaning of "illegal objective" as a factor to consider in discovery cases.

[14] See Guess, 339 NLRB at 432; Wright Electric, 327 NLRB at 1194-1195.

Union. The defendants did not attempt to ascertain the identity of non-named party employees who may have joined the WGA's organizing efforts. In light of all of the above, any infringement on employees' confidentiality interests in this case would be minimal at most.

In contrast, the Employers' interest in the requested information is critical to determining whether the Union controls the class actions to a degree that renders class action status inappropriate under California law. And, as found by the judge, the discovery is narrowly tailored to that purpose. Further, during the meet and confer process, the defendants agreed to limit and/or withdraw some of the contested discovery requests. And, in connection with the unresolved discovery requests, the defendants asked the plaintiffs on two occasions to propose alternative or less intrusive means that would allow the necessary discovery without raising confidentiality concerns. The plaintiffs did not propose any alternatives.

We therefore find that the Employers' substantial need for the requested information clearly outweighs any potential harm to employees' Section 7 rights.

The Region also seeks advice as to whether the charged parties' discovery requests that were limited or withdrawn during the "meet and confer" process were nevertheless unlawful under Section 8(a)(1) for having been propounded at all. In determining whether questioning of employees violates Section 8(a)(1), the Board considers whether, under the totality of the circumstances, the questioning "reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act."[15]

The only potentially troubling request that was limited or withdrawn is the one asking whether the named plaintiffs support the WGA's campaign to organize and/or have signed authorization cards. In this case, however, the requested information was relevant to the ability of the named plaintiffs to adequately and fairly represent the interests of the class, because if they are aligned with the Union, they may have interests that conflict with those putative class members who are not aligned with the Union.[16] In any

[15] See, e.g., Rossmore House, 269 NLRB 1176, 1177-78 (1984).

[16] See, e.g., Chateau de Ville Productions, Inc. v. Tams-Witmark Music Library, Inc., 586 F.2d 962, 966 (2d Cir. 1978) (discovery to show a conflict of interest and that named plaintiffs had used the class action for personal

event, the named plaintiffs were not compelled to answer this request, as the defendants withdrew it upon the objection of the class counsel. In these circumstances, we conclude that the discovery request was not coercive.

Conclusion

Accordingly, we conclude that the discovery requests were not unlawful and that, absent withdrawal, the charge should be dismissed.

B.J.K.

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purposes was "highly relevant" to question of adequacy of named plaintiffs as class representatives).